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NO. 84-848

In The

Supreme Court Of The United States

OCTOBER TERM, 1984

JAMES CALLARI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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Counsel for Respondent

QUESTIONS PRESENTED

1. Should this Court consider a petition filed one hundred and twenty-two days after the entry of judgment of the state court of last resort when no timely motion to reargue was filed, and no enlargement of time was granted by this Court?
2. Should this Court consider a petition that does not specify the stage of the proceedings in the state courts at which the federal questions sought to be reviewed were raised, in violation of Rule 21.1(h)?
3. Should this Court review the issue of standing of a person who had been an overnight guest in a home when such claim was not distinctly made to the Connecticut Supreme Court?

4. Should this Court review such claim when Connecticut Supreme Court considered it only collaterally related to the doctrine of collateral estoppal, and in any event affirmed a finding that consent had been given by a co-occupier of the premises?

5. Should this Court review an issue relating to the search of a locked container in such premises, when such claim was not distinctly made to the Connecticut Supreme Court?

6. Should this Court review such a claim, when the finding affirmed by the Connecticut Supreme Court disclosed that the seized contraband was in plain view, and the consent to search the premises would include the right to search containers therein?

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STATEMENT OF THE CASE

A - PROCEEDINGS

The decision of the Connecticut Supreme Court was announced on July 24, 1984. Petitioner personally was aware of such decision on August 4, 1984. On or before August 22, 1984 he contacted present counsel, (Resp. App. p.A-2) who, on August 29, 1984 filed a Motion For Permission To File Motion To Reargue, which Motion for Permission was denied on September 26, 1984 (Pet. App p. 16). No timely (10 days from date of decision) Motion to Reargue had been filed. Present counsel filed subject petition on November 24, 1984. No extension of time was sought in this Court.

B - FACTS OF THE CASE

In addition to the facts set forth

in the petition, respondent adopts the facts set forth in the Connecticut Supreme Court opinion (Pet. App. pp. 8a-14a), specifically pointing out facts which are not contained in the petition:

1) Mrs. Brady, a co-occupier of the house with her husband, invited the police into her home upon answering Sgt. Hurley's knock. She, thereafter orally, and then in writing, consented to the search of the entire house for contraband and evidence of drug dealing.

2) The room in which the suitcase was found was occupied by the Bradys and their child, and there was no proof that petitioner continued to be a guest in that room at the time of the search.

3) Mrs. Brady provided the instrument that Hurley used to open the suitcase.

4) The opened suitcase contained the remaining portion of the previously exposed large plastic baggie and the remaining portion of the contraband in that baggie, as well as seven kilo-bricks of tightly wrapped marijuana (Trans. I, pp.212-222, State's Ex. 5, 6, 7, 8).

QUESTIONS PRESENTED IN TRIAL AND APPELLATE COURTS

Addressing issues germane to this petition, petitioner presented three issues in the trial court. 1) Should collateral estoppal apply? 2) Did he have standing to object to the search of the Brady premises? 3) Was Mrs. Brady's consent voluntary? (Pet. App. pp.14a-19a).In the Appellate Court in his first Preliminary Statement of Issues, he raised only the issue of collateral estop-pal (Resp.App.p.B-1).In his subsequent

Statement, he raised issues of 1) voluntary consent and 2) collateral estoppal. (Resp. App. p.B-1). In his Brief to that court, he addressed 1) collateral estoppal and 2) he then asked "Did the Court err in denying defendant's Motion to Suppress the evidence seized without a warrant and without defendant's consent?" (Resp. App. p. B-2). The body of the brief on this issue related solely to the search of the premises (Resp. App. pp. B-2 - B-5).

The issues set forth by present counsel in the proposed motion to reargue were: 1) Appellate Court did not consider cases which might cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase; 2) Such court did not consider possible denial of counsel (Resp. App.p. C-1).

REASONS FOR DENIAL OF THE WRIT

I.

PETITION FOR WRIT NOT PROCEDURALLY PROPER

A - NOT TIMELY FILED

The Connecticut Supreme Court decision was announced on July 24, 1984. A Motion for Reargument was not timely filed in that court. Subject petition was filed on November 24, 1984. Thus, one hundred twenty-two (122) days passed from the entry of the opinion, over twice the period allowed by the Rules of this Court (R. 20.1). Petitioner has filed no motion for extension of time for a late filing, nor has he sought permission of this Court for such late filing. Present counsel was contacted by petitioner approximately twenty-nine (29) days after the decision, some thirty-one (31) days before the petition was due. The petition is untimely and

review should be denied.

B - DOES NOT STATE WHEN ISSUES SOUGHT TO BE REVIEWED WERE FIRST RAISED IN TRIAL AND APPELLATE COURTS

An examination of the petition discloses a complete failure to specify the stage in the proceedings, either in the trial or appellate courts at which the federal questions sought to be reviewed were raised. As will be argued hereafter, the precise questions sought to be reviewed were not distinctly raised in either the trial or appellate courts. Since petitioner has failed to comply with Rule 21.1(h), this Court cannot determine whether it has jurisdiction to review the judgment on writ of certiorari.

Contrary to petitioner's statement on page 8, he did not claim on appeal that the warrantless opening of his suitcase violated his Fourth Amendment

rights.

II

PRECISE QUESTIONS SOUGHT TO BE REVIEWED NOT DISTINCTLY RAISED IN LOWER COURTS

In the trial court, petitioner claimed the doctrine of collateral estoppal applied, and all the seized evidence should be suppressed. The court denied such claim. The prosecutor then claimed petitioner had to establish his standing before evidence on the substance of the motion should be heard. The court overruled such claim and ordered the hearing to proceed. Thereafter, the sole claim of petitioner was that there was no voluntary consent given by Mrs. Brady to search the premises.

In the appellate court, in his Preliminary Statement of Issues, as amended, he claimed the trial court erred: 1) In finding consent to search

was voluntarily given and 2) In failing to apply the doctrine of collateral estoppal (Resp. App. p. B-1). In his Brief he claimed error 1) In failing to apply the doctrine of collateral estoppal and 2) In denying the Motion to Suppress evidence seized without a warrant and without defendant's consent. An examination of the entire portion of the brief relating to this second issue discloses that it related solely to a search of the premises (not the container) (Resp. App. pp. pp. B-2-B-5).

In neither court was the distinct issue raised by petitioner that, even if the police had the right to seize the container, they had no right to search its interior. In neither court was the "plain view" exception to the warrant requirement raised, briefed or addressed by petitioner.

Present counsel, in her proposed Motion to Reargue set forth two claims. The second related to an alleged deprivation of counsel - an issue never even hinted at in the trial or appellate court. The first generally alleged a lack of presentation to and consideration by the appellate court of case law that evolved since the trial and original briefing. She claimed such decisions "would cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase." This claim certainly does not precisely state Question 2 of the petition, and it was not earlier raised in the appellate court. The inclusion of such new issue by present counsel was an attempt to raise it (for the first time) before the appellate court, so that it might become the subject

of this petition.

Although the first Question Presented was never precisely raised in the lower court or the appellate court, Statement of Issues, it was, in a sense, touched upon in petitioner's Brief in the appellate Court. Because it had not been specifically raised, the appellate court considered it only on the collateral issue of whether the trial court erred in refusing to apply the doctrine of collateral estoppal to all the evidence seized - the issue that was distinctly raised. In finding no error, the appellate court held that that doctrine wouldn't apply because this petitioner did not have the same standing as Brady to complain about the search of the premises.

Since neither question sought to be raised by this petitioner was distinctly raised and/or passed upon

by either the trial or appellate courts, they should not be considered for review by this Court.

III

CLAIMS ARE INSUBSTANTIAL ON THEIR MERITS

A - DECISION ON FIRST QUESTION IS FACTUAL, HAD ADEQUATE BASIS AND IS ACADEMIC

In the event this Court were to find no jurisdictional barriers to reviewing the first question, it should decline review on the ground that the issue is insubstantial on its merits. Petitioner states his first question as relating to the standing of a guest in a home to challenge the warrantless search of that home (See Pet. p.10). The Connecticut Supreme Court first held that defendant bears the burden of presenting proof to establish standing, critical to which was proof that he had a legitimate expectation of privacy

in the premises searched. It then in effect held that, based on the evidence, he had not proven such privacy expectation. The court pointed out he had been at most a social guest, who had slept in the room prior to his arrest, and there was no evidence that he was still a guest in that room during the early morning of the search of the premises (Pet. App. pp.16a-17a). The court did not hold that, as a matter of law, a current guest in a home, thought not then on the premises, has no expectation of privacy in the room he currently occupies, and thus lacks standing to challenge a search of that room. Such is the question petitioner seeks to have this court answer.

It should be remembered, Mrs. Brady (at least the co-occupier of the room) voluntarily consented to the search of

that room.

Finally, it should be noted that even though the appellate court found no equivalent standing to contest the search of the premises in deciding the issue of collateral estoppal, it nevertheless considered the critical issue of petitioner's right to object to the seizure of his effects, finding he had some expectation of privacy as to them (Pet. App. pp. 17a-18a). Thus, this ruling of the appellate court is, in a sense, academic since it did recognize standing in the petitioner to be heard on the issue of the alleged unconstitutional seizure of his effects.

B - DECISION ON SECOND QUESTION AS CONSIDERED, IS INSUBSTANTIAL ON MERITS

(1) Appellate Court Considered Seizure of Effects.

If this court finds no jurisdictional

barrier to reviewing the second question, it should decline review on the ground that the particular issue, as considered by the appellate court, is insubstantial on its merits. Though not distinctly raised by petitioner, the appellate court gave some consideration to the subject matter of the seizure of petitioner's effects. It should be remembered Sgt. Hurley did not know the suitcase was petitioner's until after he opened it, with Mrs. Brady's assistance (Pet. App. p. 11a). That court did not consider the specific question of the search of those effects because it had not been precisely presented in the trial court or in that court.

(2) Contraband Was In Plain View

The facts in the instant case are clearly distinguishable from the facts in the cases cited by petitioner in

support of his claim. In this case a portion of the clear plastic baggie containing a portion of the contraband therein was sticking out of the suitcase. It was in the plain view of Sgt. Hurley, who was legitimately on the premises. He initially was searching for other persons who might be involved in the illegal drug activities, and then for evidence against Brady. He inadvertently came across evidence that later proved to be incriminating to this petitioner. He thus had the right to seize such evidence. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L. Ed. 2d 564 (1971); Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1975) L. Ed 2d 502 (1983). If the seizure of such evidence required the opening of the suitcase to accomplish it, such action by the police would

not violate the purposes of the Fourth Amendment. Certainly if the unexposed portion of the clear plastic baggie containing marijuana were in a brown paper bag, the police would have the right to extract the entire baggie and its contents from the container. The distinction between "worthy" and "unworthy" containers is foreclosed by the central purpose of the Fourth Amendment. United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 2171 (1981). In Ross, at page 2167 n. 19, this Court pointed out that not all packages and containers found by the police during the course of a search deserve the full protection of the Fourth Amendment.

Some containers by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appear-

ance. Here, the police, at the very least, could infer that the interior of the suitcase contained contraband, because the exterior part that was visible was connected to the interior part of the baggie and contraband that was not then visible to the naked eye. If a container proclaims its contents by its distinctive configuration or otherwise, and thus allows by its outward appearance an inference to be made of its contents, those contents are similarly considered to be in plain view. Robbins v. California, 453 U.S. 470, 102, S. Ct 2841, 2844-2846 (1981).

(3) Consent Search Of Premises Permits Search of Containers Therein

Even absent the fact that the contraband was sticking out of the suitcase, the police having prior consent to search the premises, would have the right to

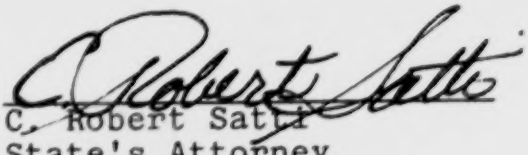
open the suitcase and examine its contents just as they have the right to open closets, chests, drawers and other containers. A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found. Nice distinctions between closets, drawers and containers in the case of a home must give way to the interest in the prompt and efficient task at hand. This rule applies equally to all containers. A container that may conceal the object of a search authorized by a warrant may be opened immediately. The scope of a warrantless search is the same as would be authorized by a warrant; only the approval of the magistrate is waived. United States v. Ross, supra 102 S. Ct at 2170-2172. Mrs. Brady consented to search the entire premises for contraband. She even assisted

in the opening of the container by providing the instrument used.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully Submitted,

by: 

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NO. 84-848

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Respondent

APPENDIX TO

BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI TO
THE CONNECTICUT SUPREME COURT

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Counsel for Respondent

AFFIDAVIT OF JAMES CALLARI

STATE OF CONNECTICUT)
) SS: New Haven
COUNTY OF NEW HAVEN) August 27,1984

I, James Callari, having been duly sworn according to law deposes and states:

1. I am the defendant in the case of State v. Callari, (9538) 194 Conn 18, decided by this Court on July 24, 1984.

2. I received the letter annexed hereto as Exhibit A on Saturday, August 4, 1984, as can be seen from the post-marks on the envelope annexed hereto as Exhibit B.

3. I reached Mr. Lavallee, the public defender who handled my appeal by telephone on Wednesday, August 8, 1984.

4. At that time Mr. Lavallee did not inform me that the time for me to

file a motion to reargue my case in the Supreme Court of the State of Connecticut had already passed.

5. I consulted the law firm of Williams and Wise on August 22, 1984, and that was the first that I heard that a ten day limitation might foreclose any opportunity I had to reargue my appeal in this court.

/s/ James Callari
JAMES CALLARI

Subscribed and sworn to before me, this 27th day of August, 1984.

/s/ Sue L. Wise
Sue L. Wise
Commissioner of
Superior Court

PRELIMINARY STATEMENT OF ISSUES

The defendant intends to present the following issues on appeal:

2. Did the trial court err in its failure to apply the prior order in STATE V. BRADY to identical facts in the instant Motion to Suppress?

Filed March 28, 1979 (Atty. Sidor)

* * * *

PRELIMINARY STATEMENT OF ISSUES

1. Did the court err in denying the defendant's Motion to Suppress, finding that a consent to search was voluntarily given?

2. Did the Court err in failing to apply the doctrine of Collateral Estoppel, on defendant's Motion to Suppress?

Filed Sept. 21, 1982 (Atty.Lavallee)

CONNECTICUT SUPREME COURT
APPELLANT'S BRIEF

ISSUES

1. Did the court err in failing to apply the doctrine of Collateral Estoppel to the defendant's Motion to Suppress?.....p.

2. Did the court err in denying defendant's Motion to Suppress the evidence seized without a warrant and without defendant's consent?.....p.

* * * *

ARGUMENT

II

The court erred in failing to suppress the evidence seized, in the room occupied by the defendant, without a warrant and without his permission.

The Fourth Amendment to the Constitution of the United States is applied to the states through the Fourteenth Amendment, State v. Jackson,

162 Conn. 440; 294 A 2nd 517, Cert. Denied, 409 U.s. 876, provides that the "Right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures shall not be violated..."

Our courts have held that since the State Constitutional provision Article 1, Section 7 is couched in the same language as the Federal Constitutional Amendment, it should be accorded the same interpretation. Ajello v. Hartford Federal Savings & Loan Assoc. 32 Conn. Supp. 198, Connecticut General Statutes Section 54-33 (F).

It is well established that a search without a warrant is per se unreasonable, subject to certain narrowly defined exceptions Katz v. United States, 389 U.S. 347; Chimel v. California,

395 U.S. 752.

In the present circumstance, the State alleges that the search of defendant's room was consented to and that this consent satisfied the requirements of a warrantless search.

In United States v. Matlock, 415 U.S. 164; 39 L. Ed. 2nd 242, 94 S. Ct. 988, the court indicates that the "Consent" of one who possesses common authority over premises or effects is valid against the non-consenting person with whom that authority is shared. That the consent of one may be sufficient to waive the Fourth Amendment expectation of privacy, but the court has never extended that waiver to a third party. Chapman v. United States, 365 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2nd 856. Bumper v. North

Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2nd 797.

Even if Mrs. Brady had been arrested following the discovery of contraband, there is a serious question that the search of the entire home would have been justified. Chimel v. California, supra.

(Brief filed by Atty. Lavallee).

MOTION TO REARGUE *

1. This Court was not presented with nor did it consider case law which has evolved since the trial and original briefing of this matter. Such decisions which would cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase, include, but are not limited to: Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980);... (other cases cited).

2. In deciding whether collateral estoppel should govern the suppression of evidence in this matter, this Court did not consider that Callari was denied counsel at critical stages of the proceedings. ...

Dated August 28, 1984 (Atty. Wise)

.....

* Proposed (Permission for late filing denied).